IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1806

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF ON BEHALF OF THE NATIONAL AUTOMATIC MERCHANDISING ASSOCIATION, AS AMICUS CURIAE.

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I. INTEREST OF THE AMICUS CURIAE.*

The National Automatic Merchandising Association ("NAMA") is the national trade association of the merchandise

* This brief is being filed with the written consents of all parties. Pursuant to Supreme Court Rule 42(2), these consents are being filed simultaneously with the Clerk of the Court.

vending and food service management industry. Its membership consists of nearly 2,000 vending and food service companies (including ARA Services, Inc., the foodservice and vending contractor at petitioner's plant) as well as over 350 vending machine manufacturers and suppliers of vendible products and component parts. Also, affiliated with NAMA are 28 state and regional councils serving this industry in their respective localities.

NAMA was founded in 1936 to assist its members in a wide spectrum of matters and regularly represents their interests before the courts, the legislatures, and the executive and administrative branches of government. Such representation constitutes a significant aspect of NAMA's activities. It is, therefore, in accordance with that role that NAMA addresses this Court in the instant case.

The questions presented in this case are of vital concern to NAMA and its members; the issue in this litigation—whether in-plant food services and prices, as provided by an independent contractor, are "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act and, accordingly, mandatory subjects of bargaining—raises a recurrent[1] and substantial problem. This industry is, in large part, dependent upon sales to employees in their workplace[2] and, as a result, compulsory bargaining between employers and their employees to control that business would manifestly have a major effect on the continued vitality of this industry. Further,

1. Prior to this case, this issue has arisen in four other cases: *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), enf. den. 387 F. 2d 542 (4th Cir. 1967) (en banc); *McCall Corporation*, 172 NLRB 540 (1968), enf. den. 432 F. 2d 187 (4th Cir. 1970); *Package Machinery Co.*, 191 NLRB 268, enf. den. 457 F. 2d 936 (1st Cir. 1972); and *Ladish Co.*, 219 NLRB 354, enf. den. 538 F. 2d 1267 (7th Cir. 1976). In each of those cases, NAMA participated before the Court of Appeals as an *amicus curiae*.

2. Over 50% of the total sales for the industry are consummated in plants, factories, and offices to employees. See, "Census of The Industry—1978", VENDING TIMES, June, 1978, at 64.

the specific arrangements between petitioner and its food service contractor which are at issue in this case are not unique so that the outcome of this litigation will have broad ramifications throughout this industry. See generally, Beitel and Funk, "What You Should Know About Location Contracts Today", VEND, March 1, 1968, at 25 (discussing the basic types and contents of location agreements, including sample contracts). For these reasons, NAMA respectfully submits its view to the Court as an *amicus curiae* in support of petitioner, Ford Motor Company.

II. ARGUMENT.

A. In-Plant Food Services and Prices Are Not Terms and Conditions of Employment.

Although "[t]he phrase 'conditions of employment' is no doubt susceptible of diverse interpretation . . . [i]t is important to note that the words of the statute are words of limitation."[3] *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 220 (1964) (Stewart, J., concurring). See also, Goetz, "The Duty To Bargain About Changes In Operations", 1964 DUKE

3. Section 8(d) of the National Labor Relations Act, as amended, defines the duty to bargain collectively as "the performance of the mutual obligation . . . to meet . . . and confer in good faith with respect to *wages, hours and other terms and conditions of employment* . . ." 29 U. S. C. § 158(d) (emphasis added). Concomitantly, Section 8(a)(5) of that Act provides that it is "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ." 29 U. S. C. § 158(a)(5).

In this case, the National Labor Relations Board found that petitioner Ford Motor Co. violated Section 8(a)(5), and derivatively Section 8(a)(1), by refusing to bargain with its employees certified representative, Local 588, United Automobile, Aerospace and Agriculture Implement Workers of America, over in-plant food prices and service. Pet. App., p. A24. That order, which was subsequently affirmed by the United States Court of Appeals for the Seventh Circuit (Pet. App., pp. A1 *et seq.*) was based upon the Board's conclusion from its prior decisional law that these subjects are "conditions of employment". Compare, Pet. App., p. A23 with pp. A42 and A43.

L.J. 1, 13 at n. 35 (1964) (discussing legislative history). That limitation has two dimensions. *First*, it includes "only issues which settle an aspect of the relationship between the employer and employees". *Allied Chemical and Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 178 (1971). *Second*, it excludes "managerial decisions which lie at the core of entrepreneurial control." *Fibreboard Paper Products Corp.*, 379 U. S. at 223 (Stewart, J., concurring). The schedule of prices and service arrangements for in-plant food service and vending operations, as provided by an independent contractor, are not "conditions of employment" within the meaning of that statutory limitation. Just as a grocery store "need not have bargained about or agreed to a schedule of prices at which its meat would be sold," so too, these subjects lie outside the sphere of mandatory bargaining.[4] *Local 189, Amalgamated Meat Cutters and Butcher Workmen* v. *Jewel Tea Co.*, 381 U. S. 676, 689 (1965).

As a threshold matter, the subject of food prices and services is not, like a no-strike clause, a matter which "regulates the relations between the employer and the employees." *Borg-Warner Corp.*, 356 U. S. at 350. See also, *Pittsburgh Plate Glass Co.*, 404 U. S. at 178. Rather where, as here, in-plant food and vending services are provided by an independent contractor,[5] those issues affect principally "the employer's freedom

4. Under federal labor law, as authoritatively construed by this Court, only those subjects specifically encompassed by Section 8(d) are "within the scope of mandatory collective bargaining." *N. L. R. B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342, 349 (1958). "As to other matters, however, each party is free to bargain or not to bargain." *Ibid.*

5. While matters involving third parties were not intended to be wholly outside the mandatory bargaining obligation, the inclusion of such subjects is warranted only where there is a demonstrably extreme impact on present employees (*e.g.*, a threatened loss of their jobs) and where other competing considerations (*e.g.*, an adverse effect on the employer's freedom to conduct his business) are absent. *Pittsburgh Plate Glass Co.*, 404 U. S. at 178-179 and n. 19. Here, however, not only are such countervailing considerations clearly present but, equally important, the subjects at issue do not "vitally affect[s]" employees. *Id.* See, discussion *infra* at pp. 8-10.

to conduct his business" with that foodservice and vending contractor. *Pittsburgh Plate Glass Co.*, 404 U. S. at 179, n. 19. The agreement between petitioner and ARA, the foodservice and vending operator at its plant, denied petitioner the right to unilaterally control either prices or services. Pet. App., p. A3. Petitioner is, therefore, legally incapacitated from bargaining on these subjects to effectuate any recision in prices or to compel any alteration in service *"after they are determined,"* as required by the Board's order. Pet. App., p. A25 (emphasis added). Conversely, as even the Board has admitted, "it is impracticable to require consultation with a union before each change in the price of any of the products sold." *Westinghouse Electric Corp.*, 156 NLRB 1080, 1081 (1966), enf. den. 387 F. 2d 542 (4th Cir. 1967) (en banc). Nor is there any basis for jointly subjecting the food and vending operator, in addition to the employer, to the collective bargaining process since any "[s]uch discussions would be held in a vacuum as there is no existing collective-bargaining relationship between the caterer and the union nor is there any legal basis for invoking one." *Id.* at 1089. Indeed, only termination of petitioner's contractual relationship with its food and vending contractor would allow petitioner the feedom to bargain over the subjects at issue (cf., *Ladish Co.*, 219 NLRB 354, 458 (1975), enf. den. 538 F. 2d 1267 (7th Cir. 1976)), but that alternative is neither practical[6]

6. In contrast, in-plant food and vending service that is operated and controlled exclusively by the employer, which would undeniably be more amenable to bargaining, is not at issue in this case but instead poses a discrete question. See, *Weyerhauser Timber Company*, 87 NLRB 672 (1949) and *McCall Corporation*, 172 NLRB 540 (1968), enf. den. 432 F. 2d 187 (4th Cir. 1970). To that extent moreover, prior decisions involving other "employer-operated" services are inapposite. See, e.g., *Lehigh Portland Cement Co.*, 101 NLRB 1010 (1952), enf'd. 205 F. 2d 821 (4th Cir. 1953). Those situations simply do not create the same problem of "fictional bargaining" by an employer which lacks, as petitioner does here, the total control necessary to effectuate the purposes of the Act in collective bargaining. See, *Westinghouse Electric Corp.*, 387 F. 2d 542, 550 (4th Cir. 1967) (en banc).

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(*id.* at 351 (Member Kennedy, dissenting)) nor warranted by the statute. Accord, *N. L. R. B.* v. *Enterprise Association of Pipefitters, Local Union No. 638*, 429 U. S. 507 (1977).

Pricing and servicing policies, moreover, are the types of "managerial decisions which lie at the core of entrepreneural control . . . [and] should be excluded from the area" of collective bargaining. *Fibreboard Paper Products Corp.*, 379 U. S. at 223 (Stewart, J., concurring). Like any other retail-oriented business, the in-plant food and vending service is essentially a merchandising operation: "[e]ach vending machine is a little like one shelf in a store." Reed, "Starting And Managing A Small Automatic Vending Business," p. 3, UNITED STATES SMALL BUSINESS ADMINISTRATION, THE STARTING AND MANAGING SERIES, Vol. 13 (G.P.O. 1967). Its prices, therefore, should stand on the same footing as those retail prices which this Court found immune from any bargaining obligation in *Local 189, Amalgamated Meat Cutters and Butcher Workmen, supra.* Similarly, service itself involves countless decisions (see, Reed, "Starting And Managing . . .", *supra*) "concerning the commitment of investment capital and the basic scope of the enterprise" and, as a result, is manifestly inappropriate for bargaining. *Fibre-*

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By the same token, although other types of third party-provided services (e.g., insurance and pensions) may, admittedly, be properly subjected to bargaining, the issues in this case stand on a different footing in terms of both their impact on employees and their intrusion on traditional principles of free enterprise. See, fn. 5, *supra.* Not only is in-plant food inherently less significant in impact than, for example, pensions but, equally important, its regulation through collective bargaining impinges much more substantially on the basic direction of the third party-contractor's business (e.g., capital investment and allocation of labor) than comparable control of an insurance or pension plan. See, discussion *infra.* Indeed, the Board has tacitly recognized this distinction by virtue of the scope of its proposed remedy in this case. Pet. App., p. A25. Cf., *Keystone Consolidated Industries,* 237 NLRB No. 91, 99 LRRM 1036, 1040 (1971) (where the remedy required the employer to roll-back changes in employee insurance coverage upon request of the union rather than, as in this case, merely "bargain on such price change only after they are determined" and without automatically rescinding those changes).

board Paper Products Corp., 379 U. S. 223 (Stewart, J., concurring). For example, ARA currently has approximately $100,000.00[7] invested in vending machines at petitioner's plant while petitioner has, similarly, dedicated space, utilities, maintenance, and all other cafeteria equipment. Pet. App., p. A3. Union-requested alterations in vending service (e.g., additional coffee service; more hot and less cold food, etc.), therefore, entail either additional or alternative investments by the foodservice and vending contractor. Concomitantly, any requested changes in the manual foodservice inherently affect ARA's own labor relations with its employees at petitioner's plant and/or petitioner's capital investment: faster service, for instance, may necessitate either changes in job duties, additional hiring, and/or further investment in labor-saving machinery. Both the prices charged and the types and amounts of services provided, accordingly, mainly concern the ability of the independent foodservice and vending contractor to operate profitably[8] within the con-

7. Joint Exhibit 22 lists the number and type of vending machines which ARA has placed in use at petitioner's plant. Of the 120 machines described in that exhibit, 100 fall within the descriptions contained in the UNITED STATES DEPARTMENT OF COMMERCE, CURRENT INDUSTRIAL REPORTS, "Vending Machines (Coin Operated) 1977", Document MA-35U (77-1) (issued May, 1978). That report, moreover, details the number and aggregate value by types of vending machines shipped during 1977.

With this information, an average value per unit for each type of vending machine (e.g., soft drinks, coffee and hot beverages, etc.) at petitioner's plant was calculated. This average value per unit was utilized to determine the aggregate value of each category of machines at the plant and then the total aggregate value for the 100 machines within these descriptions. That total figure was calculated at $97,000.00 and with the addition of the noncategorizable equipment (e.g., micro-wave ovens and currency changers), it is submitted that ARA's investment in such equipment at petitioner's plant exceeds $100,000.

8. As the Board has previously noted, the existence or absence of profits is "not a mandatory subject for collective bargaining". *Package Machinery Co.*, 191 NLRB 268, 269 at n. 5 (1971) enf. den. 457 F. 2d 936 (1st Cir. 1972). Nor are profits, for either petitioner or its contractor, even a proper factor in assessing a bargaining obligation. *Pittsburgh Plate Glass Co.*, 404 U. S. at 176-177, n. 17. See also, *Fibreboard Paper Products Corp.*, 379 U. S. at 223 (Stewart, J., concurring).

straints of its agreement with an employer. To subject such matters to collective bargaining "would mark a sharp departure from the traditional principles of a free enterprise economy"; a departure which, moreover, "Congress certainly did not choose when it enacted the Taft-Hartley Act." *Fibreboard Paper Products Corp.*, 379 U. S. at 226 (Stewart, J., concurring).

B. In-Plant Food Services and Prices Do Not Vitally Affect Employees' Terms and Conditions of Employment

Although matters involving third parties, such as food service and vending contractors, "are not wholly excluded" from the range of topics subject to mandatory bargaining, the inclusion of any such issue is warranted only when "it vitally affects the terms and conditions of employment."[9] *Pittsburgh Plate Glass Co.*, 404 U. S. at 179. The significance of a given topic on the terms and conditions of employment, moreover, must inherently be assessed in the context of the totality of circumstances.[10] *Ibid.* Applying that analysis in the instant case, it is ineluctably manifest that "the impact" of in-plant food services and prices "on the 'terms and conditions of employment' of active employees is hardly comparable to the loss of jobs threatened in *Oliver* and *Fibreboard*" and cannot be deemed to have "vitally affected" employees. *Id.* at 182.

Nothing in the Board's decision in this case establishes that this subject "vitally affects" employees' terms and conditions of

9. Yet, as this Court has cogently noted, even where such impact is conclusively demonstrated, "[o]ther considerations, such as the effect on the employer's freedom to conduct his business, may be equally important." *Pittsburgh Plate Glass Co.*, 404 U. S. at 179, n. 19. See also, *N. L. R. B.* v. *Katz*, 369 U. S. 736, 748 (1962). That caveat is especially apropos in this case. See discussion at pp. 3-8, *supra*.

10. This standard arises implicitly in this Court's prior decisions as was acknowledge by the Court of Appeals in this case. Pet. App., pp. A8-10. It is, moreover, intuitively obvious that, without such a standard, this Court's "vitally affects" test would be substantially undermined. Cf., *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469 (1941).

employment. Only its suggestions that reasonable alternatives to in-plant food are not viable (Pet. App., p. A23, fn. 11; Brief For The National Labor Relations Board In Opposition [To Certiorari], pp. 10-11) even deal with this criterion[11] and those questionable findings are, by its own admission, insufficient: "[t]he fact that alternative eating facilities are available is not determinative [but rather] is a factor to be considered." *McCall Corporation*, 172 NLRB at 546. Other factors which would be equally significant, such as the relationship between overall in-plant prices and market prices or the relationship between the amount of the price increases in comparison to normal inflationary increases in food prices generally,[12] were totally ignored; similarly, the alternative options of bargaining over related, but clearly mandatory, subjects[13] (e.g., wages, time available for lunch, air-

11. Other factors relied upon by the Board and the Court of Appeals are not only spurious (see, Petition for Writ of Certiorari, pp. 8-9) but also are unrelated to the impact on employees. Neither petitioner's potential for profit nor its potential for control of the food service operation affect the significance of this subject for employees. *Pittsburgh Plate Glass Co.*, 404 U. S. at 176-179, n. 17. See also, discussion *supra* at pp. 3-8. Similarly, employee interest cannot be equated with employee impact, and, in any event, would, if utilized as a factor, make any issue subject to mandatory bargaining contrary to Congressional intent. *Fibreboard Paper Products Corp.*, 379 U. S. at 221 (Stewart, J. concurring). Conclusionary labelling of this matter as part of the "physical dimension of one's working environment" (Pet. App., p. A12), moreover, only begs the true question: "whether it vitally affects the 'terms and conditions' of . . . employment." *Pittsburgh Plate Glass Co.*, 404 U. S. at 179. See, Cox and Dunlop, "Regulation Of Collective Bargaining By The National Labor Relations Board," 63 HARV. L. REV. 389, 401 (1950).

12. Here, there is no allegation, much less evidence, that the food prices were excessive or unreasonable. Thus, while bargaining might in certain cases be appropriate where no alternatives exist (but see, fn. 13 *infra*) "to protect the negotiated wage scale against possible undermining through the diminution of the [employee's] wages" due to outrageous prices (*Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, 293 (1959), this is demonstrably not such a situation. "[T]his is obviously not the case of hardship . . ." *N. L. R. B.* v. *Package Machinery*, 457 F. 2d at 937.

13. Since other avenues of bargaining are readily available for many subjects, including numerous mandatory issues (e.g., higher

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conditioning to alleviate spoilage in brown-bagging, cost of living adjustments geared to in-plant food prices, etc.) were equally improperly disregarded. See generally, *N. L. R. B.* v. *Package Machinery Co., supra*.

Furthermore, "equating the trifles here with subjects such as wages, hours, working conditions, job security, pensions, insurance, choice of bargaining representatives or other subjects directly and materially affecting 'conditions of employment' is sheer nonsense." *Westinghouse Electric Corp.* v. *N. L. R. B.*, 387 F. 2d at 550 (en banc). In-plant food prices and services are neither integral to the establishment of a stable wage structure nor closely related to job security.[14] *Oliver*, 358 U. S. at 292-295. Cf., fn. 12, *supra*. Indeed, any purported relationship between these subjects and employees' terms and conditions of employment is simply "too speculative" and "insubstantial" a foundation upon which to base an obligation to bargain in this case.[15] *Pittsburgh Plate Glass Co.*, 404 U. S. at 180 and 182.

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wages instead of pensions), the existence of alternative subjects for bargaining cannot be made the sole touchstone. Yet, at the same time, it is not inappropriate to utilize the availability of alternative channels of bargaining as a factor in the more limited determination of whether a particular subject involving a third-party so "vitally affects" employees' terms and conditions of employment as to be deemed a mandatory subject for bargaining.

14. In addition, removing these subjects from the scope of mandatory bargaining will not result in "disparaging or undermining the union" in its efforts to improve working conditions. *N. L. R. B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 151 (7th Cir. 1951). Other less onerous and more direct bargaining routes remain available to protect any legitimate employee interests. See, fn. 13 *supra*.

15. Employees purchasing in-plant, from a practical standpoint, are not differently situated from employees consuming off-plant food. There is neither a greater impact nor any additional right to compel bargaining over the third party's food service and prices merely because it is at the workplace. Cf., *Local 189, Amalgamated Meat Cutters and Butcher Workers*, 381 U. S. at 689 and *Pittsburgh Plate Glass Co.*, 404 U. S. at 179, n. 19.

III. CONCLUSION.

For each of the foregoing reasons, as well as for the reasons set forth in petitioner's briefs, the judgment of the Court of Appeals should be reversed and the Board's order denied enforcement.

Respectfully submitted,

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